Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RAYMOND MITCHELL, III,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tennessee rape accomplished by fraud statute is unconstitutional as void for vagueness and overbreadth where the fraud established at trial did not relate to the act of sexual penetration but involved matters other than the act of sexual penetration?

2. Whether Petitioner's right to due process of law was violated for the failure of the court to grant a request for a bill of particulars setting forth the notice and fair warning of the prohibited conduct?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Tennessee entered in this matter on July 30, 1999.

OPINIONS BELOW

The July 30, 1999 opinion of the Court of Criminal Appeals, whose judgment is herein sought to be reviewed, is reported at *State of Tennessee v. Raymond Mitchell, III*, Nos.: 01C01-9612-CR-00502, 01C01-9702-CR-00057, 1999 WL 559930 (Tenn.Crim.App. July 30, 1999) which decision is unpublished, and is reprinted in the appendix to this Petition, p. 1.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on July 30, 1999. The Court of Criminal Appeals of Tennessee denied Petitioner's Petition for Rehearing which Order was entered August 19, 1999. Appendix p. 40.

The Supreme Court of Tennessee denied Petitioner's TN.R.App.Proc. Rule 11 Application for permission to Appeal from the Court of Criminal Appeals to the Supreme Court of Tennessee which Order of Denial was entered on January 31, 2000. Appendix p. 41.

The Jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1257(a). The judgment and opinion of the

Court of Criminal Appeals is the highest state court to render a decision on the merits of Petitioner's case in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution to the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor denied any person within its jurisdiction the equal protection of the laws.*" (Emphasis added)

This case also involves the fifth amendment to the Constitution of the United States. Said amendment reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property without due process of law;* nor shall private property be

taken for public use, without just compensation. [Emphasis added].

This case involves Tennessee Code Annotated § 39-13-503(a)(3)

(1991). Said provision is set out verbatim.

"39-13-503. Rape.

(a) a rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accomplished by any of the following circumstances: (3) the sexual penetration is accomplished by fraud."
[Acts 1989, ch. 591, sec. 1.]

The pertinent portions of T.C.A. § 39-11-106(a)(13) are:

(a) The following definitions apply to this title, unless the context requires otherwise:

(13) "Fraud" is defined as used in normal parlance and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge, and shall be broadly construed to accomplish the purposes of this title.

STATEMENT OF THE CASE

Petitioner was indicted by the grand jury of Davidson County, Tennessee and charged in a four count indictment charging him with three counts of rape by fraud in violation of T.C.A. § 39-13-503(a)(3) (1991)[1] in one count of attempted rape by fraud. Petitioner initially challenged

[1] In 1995, the general assembly amended Tenn. Code Ann. § 39-13-503(a). The offense of rape accomplished by fraud was preserved and is currently codified at § 39-13-503(a)(4).

the constitutionality of T.C.A. § 39-13-503(a)(3) on the grounds that the Tennessee rape accomplished by fraud statute failed to meet the fair-warning requirement embodied in the due process clause of the fifth Amendment of the United States Constitution as made applicable to the states through the fourteenth amendment of the United States Constitution in *Malloy v. Hogan*, 378 U.S. 1 (1964).

Petitioner's Motion to Dismiss filed on December 20, 1995 was denied by the Trial Court prior to trial by an oral ruling of the Trial Court.

Prior to trial one of the rape charges was severed by the State and set to be adjudicated separately. Petitioner entered a plea of guilty to the reduced charge of sexual battery on the severed charge of rape accomplished by fraud. As part of the plea agreement therein he reserved the constitutional challenge to the statute as set forth in his Motion to Dismiss.

The remaining two counts of rape accomplished by fraud and the one count of attempted rape accomplished by fraud were tried by jury on January 16-18, 1996. The jury returned verdicts of guilty on all counts. Petitioner duly appealed his convictions to the Court of Criminal Appeals of Tennessee and the Court of Criminal Appeals rendered its opinion on July 30, 1999 affirming Petitioner's convictions. Petitioner thereafter filed a Petition for Rehearing which was denied and petitioner subsequently filed his Application for Permission to Appeal to the Supreme Court of Tennessee which was denied on

January 31, 2000. At each stage of the proceedings petitioner raised his challenge to the constitutionality of the statute codifying rape accomplished by fraud.

Neither the Indictment nor the Tennessee Rape by fraud statute set forth the element or elements of rape accomplished by fraud except as 'sexual penetration accomplished by fraud.' The evidence at trial was that of consensual sexual acts that was accomplished by a fraudulent inducement.

Petitioner's conviction arose from the following conduct. Petitioner would call one of the women alleged in the indictment during the early morning hours and engage the woman in conversation which conversation would then lead to talk of sexual fantasies. During these conversations with each woman, petitioner would whisper throughout the phone conversation. During each phone conversation petitioner would suggest that they act out this sexual fantasy which consisted of the woman unlocking the entry to her residence and lying naked on her bed with a blindfold on and petitioner would come to her home and engage in sexual intercourse while the woman was blindfolded.

Both of the participants in this sexual activity knew from the outset that sexual intercourse was the object of the activity. Petitioner did not mislead any of these women concerning the nature of the activity. Each knew that sexual intercourse was the intended act.

Petitioner was indicted and tried by jury for violating Tennessee's Rape statute which defines rape as "sexual penetration accomplished by fraud". The alleged fraud

was not identified or specified in the indictment. Appendix, p. 42.

Petitioner filed his request for a Bill of Particulars seeking to require the State to delineate the nature of the fraud prior to trial. The Trial Court did not require the State to identify the fraud in response to Petitioner's request for Bill of Particulars. The Trial Court ruled that the State need only specify the date, time and location of the offense in response to a request for a Bill of Particulars. This ruling was affirmed by the Court of Criminal Appeals of Tennessee.

At Trial both women K.M. and C.S.[2] acknowledged that they understood and knew that the activity to be engaged in as a result of their phone conversations with Petitioner was sexual intercourse. Both women testified that they believed the late night caller was their fiancé or boyfriend and they were lead to believe that by the conversation that they had with Petitioner. K.M. acknowledged that she, in the early morning hours, left her residence and drove to a local motel and rented a room in order to act out the fantasy as described in her telephone conversation with petitioner. In a similar fashion C.S. unlocked the front door of her residence and lay on her bed blindfolded but otherwise naked awaiting the arrival of petitioner to act out the previously described fantasy.

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[2] Due to the nature of the crimes in this case it has consistently been the policy of the Appellate Courts in Tennessee to refer to the victims only by their initials and therefore the petitioner will do likewise.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court in *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) stated:

> As generally stated, the void-for-vagueness doctrine requires that a penal state define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.]

Although the doctrine focuses on both actual notices to citizens and arbitrary enforcement, the courts have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimum guidelines to govern law enforcement."

T.C.A. § 39-13-503(a)(3) (1991) [Acts 1989 ch. 591, § 1] sets forth the offense of rape by fraud. This statute fails to pass muster under the void-for-vagueness doctrine under both prongs. It fails to provide actual notice to the citizens and fails to establish minimal guidelines to govern law enforcement regarding the enforcement of this penal statute. The United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) when striking down a Massachusetts statute which imposed criminal liability on anyone who publicly "treats contemptuously" the United States flag. The district court had initially found that the flag-contempt portion of the Massachusetts statute was impermissibly vague under the due process clause of the Fourteenth Amendment as

well as overbroad under the First Amendment. In its holding, the district court concluded that the words "treat contemptuously"did not provide a readily ascertainable standard of guilt especially in these days when flags are commonly displayed on hats, garments, and vehicles. The district court further found that the words "treats contemptuously" leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution. The United States Supreme Court agreed with the holdings of the district court and the Court of Appeals on the due process doctrine of vagueness. The U.S. Supreme Court stated:

> The settled principles of that doctrine [due process doctrine of vagueness] require no extensive restatement here. The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by narrowing state court interpretation, is capable of reaching expressions sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other context. The statutory language at issue here, publicly treats contemptuously the flag of the United States has such scope and at the relevant time was without the benefit of judicial clarification. *Smith v. Goguen*, at 39 L.Ed.2d pp. 611-12.

The statute pertaining to rape accomplished by fraud in which Defendant was tried does not set reasonably clear guidelines for law enforcement officials and triers of fact to determine the fraud aspect of sexual penetration

accomplished by fraud. The legislature has put no parameter, standard or guideline concerning the scope of prohibited conduct, be it an act or omission, which may be included within the meaning of the term "fraud." Neither victim in the Defendant's prosecution stated that they were unaware of the nature of the activity they were to engage in with Defendant. Both victims testified that they were fully cognizant of the fact that the act of sexual intercourse was to be engaged in upon the arrival of Defendant at their respective locations.

The element of fraud, to sustain the conviction herein, must necessarily relate to an act or omission which is other than the act of sexual penetration. "Fraud" defined as how the term is used in normal parlance fails to provide the reader any notice concerning what conduct is or is not permissible. This definition of fraud is not unsimilar to the Massachusetts statute concerning "treats contemptuously" the United States flag. At trial, the State offered no proof concerning any deceit, trickery, misrepresentation and subterfuge, or any other definition of fraud which would fall within the penumbra or normal parlance associated with the nature and character of the act, i.e., sexual penetration, that was to occur by and between the Defendant and each respective victim.

The United States Supreme Court in *Poster 'N' Things v. United States*, 511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994) held that the Mail Order Drug Paraphernalia Control Act contained a scienter requirement and was not unconstitutionally vague as applied. The United States Supreme Court reaffirmed the position it set forth in *Kolender v. Lawson* requiring not only actual notice but that the legislature set forth reasonably clear guidelines

for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement concluded that 21 U.S.C. § 857 passed muster under the void-for-vagueness doctrine because:

> First, the list of items in § 857(d) constituting per se drug paraphernalia provides individuals and law-enforcement officers with relatively clear guidelines as to prohibited conduct. With respect to the listed items, there can be little doubt that the statute is sufficiently determinant to meet Constitutional requirements. *** Second § 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia. These factors minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute. *** Finally, the scienter requirement that we have inferred in § 857 assists in avoiding any vagueness problem. *Poster 'N' Things v. U.S.*, at 511 U.S. p. 526, 128 L.Ed.2d p. 552.

T.C.A. § 39-13-503 does not set forth any per se list of what would amount to fraud, nor does it set forth any objective criteria for determining what would constitute fraud. There are no state court decisions interpreting what would be the fraud as it relates to an act or omission that is not the act of sexual penetration. The statutory definition of fraud could conceivably include any misrepresentation that an individual makes as he attempts to woo another into a sexual relationship.

Due process requires that a statute which criminalizes conduct be sufficiently clear in order to provide adequate warning to a person of what conduct be sufficiently clear in order to provide adequate warning to a

person of what conduct is prohibited. The statutes as charged fail to meet the fair-warning requirement embodied in the due process clause. The fair warning requirement which is embodied in the due process clause prohibits holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed. See *U.S. v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

The only limitation on the parameters of rape accomplished by fraud is by reference to the term deception (trickery, deceit and subterfuge as contained in the statutory definition of fraud are not defined by statute). Deception does not extend to puffing or matters of no pecuniary value. T.C.A. § 39-11-106(a)(6). The defense requested the charge which was denied by the trial court. The Court of Criminal Appeals found the omission of the charge on the statutory definition of deception to be error but harmless. The only available limiting language relevant to the charge of rape accomplished by fraud was not charged and if charged the Petitioner could not have been found guilty by a rational trier of fact beyond a reasonable doubt.

The trial court overruled Petitioner's Supplemental Motion for a Bill of Particulars to require the State to provide a Bill of Particulars including information in addition to identifying the date, time and location of the offenses.

The Federal Courts in interpreting Fed. R. Crim. Proc. R.7(F) have consistently held that a charging instrument is done so in general terms and therefore the purpose and function of a Bill of Particulars is to supply

narrowing specificity and to provide the Defendant with information which pleadings by reason of their generality do not give. See generally *U.S. v. Sweig*, 316 F. Supp. 1148 (E.C.N.Y. 1970); *U.S. v. Boyer*, 13 F.R.D. 91 (E.C.W.Va. 1952); and *U.S. v. Rainey*, 10 F.R.D. 431 (E.C.Mo. 1950); and *U.S. v. White*, 753 F. Supp. 432 (D.Conn. 1990).

The sufficiency of an indictment does not end the inquiry into whether or not a Bill of Particulars is required. The U.S. Supreme Court has recognized that a defendant, although informed as to the charge, is entitled to more definite information to enable him to prepare his defense and avoid surprise. See generally *U.S. v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953) [If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a Bill of Particulars.] and *Roviaro v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) [Government required to reveal identity of "John Doe" informant pursuant to request for Bill of Particulars]. Petitioner was tried on two counts of rape by fraud and one count of attempted rape by fraud. The charging instrument is worded in the terms of the statute and therefore does not describe with particularity or any exacting degree what the fraud and rape by fraud is or the attempted rape by fraud. The element of fraud is not incidental to the charge of rape by fraud or attempted rape by fraud; it is an element of the offense. The nature of the offenses necessarily include the factual basis of the alleged fraud engaged in by the Petitioner to accomplish these offenses.

The Petitioner prior to trial was entitled to be aware of the factual basis of the alleged frauds so that he would

have an opportunity to investigate prior to trial and would not be subject to surprise at trial concerning the act which constituted rape by fraud or attempted rape by fraud.

The Court of Criminal Appeals in *State v. Tizard*, 897 S.W.2d 732 (Tenn. Crim App., 1994), took a broad view of what constitutes fraud as it relates to the offense of sexual battery. The Court of Criminal Appeals accepted the State's argument in *Tizard* that fraud comprises:

> "anything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue or unconscientious advantage is taken of another."

The Court of Appeals concluded that:

> "the view of fraud which the state asserts is the one contemplated by legislature in its statutory definition of fraud and its criminalizing sexual contact accomplished by fraud."
>
> *See State v. Tizard* at 1994 WL 630498 *9.

Any accused, to adequately prepare a defense to these charges, is entitled to know what acts, omissions, and concealments involving a breach of legal or equitable duty, trust or confidence, justly reposed, resulting in damage to another, or by which an undue and unconscionable advantage is taken of another which the State intends to prove as part of its case in chief against the accused.

The question concerns what acts, omissions and/or concealments involving a breach of legal or equitable

duty, trust, or confidence justly reposed, deceit, trickery, misrepresentation or subterfuge is germane to the preparation of his defense. Petitioner, as are all defendants, is entitled to know the sum and substance of the offense(s) to which he is charged. To be regulated to first learning the nature of the fraud at trial effectively denied Petitioner of his constitutional rights to a fair trial, effective assistance of counsel and renders shallow his right to confront his accusers.

Defendants are foreclosed from later complaining that the allegations in an indictment were too non-specific to permit preparation of a defense if they did not avail themselves of the opportunity to request a bill of particulars. See, Tenn. Rules of Criminal Procedure, Rule 7(c), and *State v. Joyner*, 759 S.W.2d 422 (1987).

The Indictment did not identify nor permit the Petitioner to extrapolate from the wording of the Indictment what the fraud complained of is. Fraud is defined by statute, T.C.A. § 39-11-106(a)(13), as "the term as used in normal parlance . . . " is so broad that it includes both acts and omissions. No defendant could properly prepare his or her defense if they did not know whether the offense complained of charged an act or charged an omission.

CONCLUSION

Petitioner therefore respectfully requests that this Court grant this Petition for a writ of certiorari, hold that the an appeal lies on his claim that the Tennessee statute

codifying 'rape accomplished by fraud' is unconstitutional and that the denial of a Bill of Particulars denied Petitioner due process of law and remand the case to the lower court for appropriate proceedings.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT NASHVILLE

FEBRUARY 1998 SESSION

STATE OF TENNESSEE Appellee, v. RAYMOND MITCHELL, III Appellant.	) C.C.A. NO. 01C01-9612-CR-00502) (consolidated with)) C.C.A. NO. 01C01-9702-CR-00057)) DAVIDSON COUNTY)) Hon. Ann. Lacy Johns, Judge) (Presiding at trial))) Hon. Seth Norman, Judge) (Presiding at guilty plea hearing))) (Rape; Attempted Rape)

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OPINION FILED: JUL 30 1999

AFFIRMED

WILLIAM M. BARKER, SPECIAL JUDGE

OPINION

The appellant, Raymond Mitchell, appeals as of right from the convictions he received in the Criminal Court of Davidson County. The appellant was indicted on three counts of rape accomplished by fraud and one count of attempted rape by fraud. Before trial, one of the rape charges was severed by the prosecution and set to be adjudicated separately. The remaining two counts of rape by fraud and the count of attempted rape by fraud were tried together.

The appellant was tried by a jury in the joint proceeding and was convicted as charged on the two counts of rape and the single count of attempted rape. The trial court sentenced him as a Range I standard offender to ten years for each conviction of rape and to five years for the conviction of attempted rape. The ten-year sentences were ordered to run concurrently to each other and consecutively to the five-year sentence, for a total effective sentence of fifteen years.

On the severed count of rape by fraud, the appellant entered a plea of *nolo contendere* to the lesser offense of

sexual battery. The trial court sentenced the appellant to two years on that conviction, to run concurrently to the above fifteen-year sentence. The appellant reserved a certified issue for appeal from the plea agreement. His appeal in that case has been consolidated with his direct appeal from the jury trial.

The appellant raises the following issues in this consolidated appeal:

> (1) Whether the offense of rape by fraud, as provided in Tenn. Code Ann. § 39-13-503(a)(3) (1991),[1] is unconstitutionally vague as applied in this case[2];
>
> (2) Whether the indictment was invalid for failing to include a factual basis to support the element of fraud in the charged offenses;
>
> (3) Whether the trial court erred in denying his pre-trial motion for a bill of particulars;
>
> (4) Whether the indictment was constitutionally deficient in failing to allege the *mens rea* with respect to the charges of rape;
>
> (5) Whether the trial court erred in admitting into evidence testimony and photographs showing the contents of appellant's vehicle at the time of his arrest;

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[1] In 1995, the General Assembly amended Tenn. Code Ann. § 39-13-503(a). The offense of rape accomplished by fraud was preserved and is currently codified at section 39-13-503(a)(4).

[2] The appellant raises this first issue both in his certified appeal from the plea agreement and in his appeal from the convictions he received in the jury trial. The remaining issues to be addressed in this case are raised solely in the appeal from the jury trial.

(6) Whether the trial court erred in denying appellant's motion to sever the multiple count indictment;

(7) Whether the prosecution issued a peremptory challenge to a prospective juror in violation of *Batson v. Kentucky*;

(8) Whether the trial court improperly instructed the jury on the statutory definitions of "deception" and "coercion"; and

(9) Whether the evidence is legally sufficient to sustain his convictions of rape by fraud and attempted rape by fraud?

After a careful review of the record, we find no reversible error and affirm the appellant's convictions.

BACKGROUND

The appellant came to be known as the "Fantasy Man" in Davidson County based upon a pattern of late-night telephone calls he made to several young females in the Nashville area. He first contacted victim K.N.[3] during the early morning hours of August 24, 1992. In a whisper, he addressed K.N. by her first name and initiated a conversation. When K.N. asked the appellant to identify himself, he responded in a whisper, "[t]his is Chris," and "this is your Fantasy Man."

---

[3] Due to the nature of the crimes in this case, we shall refer to the victims only by their initials.

K.N. testified that she believed the caller to be her then fiancé, Kristan Kivilaan.[4] Pretending to be "Chris," the appellant began talking to K.N. about the upcoming wedding plans and the honeymoon. He told K.N. that he loved her and that he wanted her to do a special favor for him. He stated that he had a special fantasy from the movie, *Nine and ½ Weeks*, and that he wanted her to act out a scene from the movie with him. The fantasy involved K.N. traveling to a nearby hotel where she was to check into a room and wait for his arrival. The appellant told her to take a blindfold and to place it over her eyes while waiting for him in the room. He told her that when he arrived, they would act out his fantasy and have sexual intercourse at the hotel.

The appellant discussed his fantasy with K.N. for approximately thirty minutes before she finally agreed to meet him at a nearby Days Inn Hotel. K.N. checked into a first floor room and sat on the bed to wait for "Chris." After several minutes, the appellant called K.N.'s room and gave her further instructions. Still whispering, he told her to remove her clothing and to lie down on the bed with the blindfold over her eyes. He told her to masturbate on the bed and that if the window shades were open and the door were unlocked, he would enter her room and act out the fantasy.[5]

---

[4] The appellant apparently learned of K.N. and her then fiancé, Mr. Kivilaan, through an engagement announcement that appeared in the Sunday *Tennessean*. The announcement was printed in the newspaper the day before appellant placed the telephone call to K.N.

[5] As part of appellant's fantasy, he instructed K.N. not to say anything to him or touch him once he entered the hotel room.

K.N. insisted on the telephone that she and "Chris" have a face-to-face talk because the whispering and surepticious behavior were beginning to frighten her. The appellant reminded her that he loved her and that if she loved him, she would do this special favor. K.N., however, did not fully comply with the appellant's instructions. She opened the window curtains and sat down on the bed, but she did not remove her clothing or unlock the door. Moments later a strange man, later identified as the appellant, walked past K.N.'s window. K.N. testified that she was frightened by the sudden appearance of the strange man.

K.N. stayed in the room and soon received another telephone call from the appellant. She testified that the caller expressed anger because she had not followed his instructions. She told the caller that she did not feel comfortable with the circumstances and asked if they could talk in person. The appellant again gave her the instructions and promised her that if she followed along, they would have a good time and would talk later.

K.N. finally agreed to take off her clothes and to lie on the bed with the window curtains open and the door unlocked. While lying down, she placed a hand towel over her eyes as a blindfold. She positioned the towel so that she could still see under it. Soon thereafter, she saw a strange man move in front of her window and begin masturbating. She testified that she immediately got up from the bed to close the curtains and to lock the door. She then contacted her next-door neighbor, Jim Underwood, who is a Nashville Metro police officer.

K.N. testified that she truly believed the caller was her then fiancé Mr. Kivilaan, even though she and Mr. Kivilaan had never discussed sexually explicit matters on the telephone. She stated that the man outside her hotel window was not Mr. Kivilaan. She identified the person in the window as a black male, wearing a royal blue sweatshirt, khakis, and a dark rolled-up stocking cap.

In a taped interview with Detective Stan Marlar,[6] the appellant stated that he was the man who called K.N. by telephone and asked her to act out his fantasy at the Days Inn Hotel.[7] He stated that he walked by her hotel window, the first time, and noticed that she was not wearing a blindfold. After a follow-up telephone call, he walked by the window a second time. He admitted to Detective Marlar that he intended to have sexual intercourse with K.N. "[i]f she had gone along with that."

The appellant told Detective Marlar that he contacted other young females about his sexual fantasy. He called victim C.S. during the early morning hours of July 19, 1994. In a whisper, the appellant asked C.S. what she was doing, to which she replied that she had been sleeping. The appellant then asked her if she knew who he was, to

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[6] Before his arrest, the appellant agreed to be interviewed by Detective Marlar in the presence of appellant's attorney. Detective Marlar works in the sex abuse unit of the Nashville Metropolitan Police Department.

[7] The appellant did not testify at trial. However, his statements to Detective Marlar were admitted into evidence.

which she replied, "Yes, Jeff." C.S. testified that the caller confirmed that he was Jeff.[8]

According to C.S., she and Jeff had spent nights together in the past and had engaged in sexual intercourse. She testified that it was not unusual for Jeff to call her late at night and ask her to come over. She, therefore, willingly talked to the whispering caller, whom she believed to be Jeff. They talked about prior relationships and the appellant told C.S. that he loved her and wanted to marry her. C.S. testified that as they talked, the caller told her that he was masturbating.

Still pretending to be "Jeff," the appellant asked C.S. if she had ever seen the movie, *Nine and ½ Weeks*. When she said "no," the appellant described a scene from the movie where a guy mysteriously enters a room and has sexual intercourse with a blindfolded woman. The appellant asked C.S. to act out the movie scene with him by removing her clothes, opening the window blinds, and waiting for him on her bed. He instructed her to unlock the door and to put her dog in its cage before his arrival. At that point, she was to put on a blindfold and lay silent on her bed.

C.S. testified that she believed the caller was her friend, Jeff. Knowing that Jeff had never been to her apartment before, she willingly gave the caller directions

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[8] The appellant told Detective Marlar that he spoke to C.S. in the parking lot of her apartment complex before he contacted her by telephone. He obtained her telephone number from directory assistance.

to her apartment. She then waited for "Jeff" to arrive, but did not unlock her door or remove her clothing.

C.S. testified that she stayed in bed while waiting for "Jeff" to arrive. After a few minutes, she heard a knock at her window and then received another telephone call. The whispering caller told her that she was not performing her role correctly. He repeated the instructions and asked her to cooperate. C.S. testified that she finally agreed to act out the caller's fantasy only because she believed the caller was Jeff.

C.S. opened her apartment door, undressed, and laid down with a blindfold over her eyes. Moments later, she heard another knock at the window and heard someone enter her bedroom. C.S. asked if the person was Jeff, and the appellant whispered, "Yes, don't talk." He then began to lick her toes and to touch her thighs as he made his way onto the bed. C.S. testified that she said, "Jeff, tell me something that only you and I know," but she heard no answer. The appellant continued the fantasy by penetrating C.S.'s vagina with his tongue and also with his penis. At that point, C.S. realized that the man was not Jeff. She testified that she was horrified by the event, but remained still because she feared that the man had a weapon. She stated that she also felt physically vulnerable because of a recent surgery on her ankle. The appellant continued the sexual intercourse with C.S. until ejaculation and then immediately left the apartment.

C.S.'s roommate, Shannon Cooley, arrived at the apartment around 6:00 a.m. that same morning and found

C.S. crying and upset.[9] After contacting the police to report a rape, both C.S. and Ms. Cooley met with Detective Marlar to give a full statement.

Detective Marlar was assigned to investigate the related cases involving the alleged "fantasy" rapist. Based upon statements and evidence from C.S. and K.N., Detective Marlar began patrolling several public phone booths in the Nashville area.[10] Detective Marlar testified that the appellant became a suspect after he and other officers observed the appellant making routine late-night telephone calls at several phone booths under police surveillance. Detective Marlar brought the appellant in for the tape recorded interview on January 19, 1995.

The appellant told the detective that he spoke to C.S. at her apartment complex before he called her on the telephone. He stated that during their telephone conversation he told her that he loved her and that they should get married someday. He also stated that C.S. was blindfolded when he had oral sex and intercourse with her. However, he contended that he never told her or gave any indication that he was somebody other than himself.

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[9] Ms. Cooley was not at the apartment when the rape occurred.

[10] There was evidence that the appellant placed a subsequent telephone call to C.S.'s apartment approximately three months after the rape. Ms. Cooley answered the telephone and recognized that the whispering voice matched the description given by C.S. Ms. Cooley immediately contacted Detective Marlar and informed him of the telephone call. That call and the earlier July telephone call were traced on C.S.'s caller identification box to two public telephone booths in the Nashville area.

He stated that although C.S. may have thought he was another person, she never asked him about his identity and he never told her.

Following the taped interview, the appellant was indicted by the Davidson County Grand Jury and was arrested on the charges of rape and attempted rape accomplished by fraud. When reports of the appellant's arrest were made public, a third woman, M.J., came forward with statements that she too had been victimized by a whispering "fantasy" caller.[11] M.J. identified the appellant from a photographic line up as the culprit. Based upon her statements and the identification evidence, an additional count of rape by fraud was added to appellant's indictment.

The appellant entered a plea agreement on that count after it was severed from the indictment. At the guilty plea hearing, the State offered proof that M.J. was living in an apartment in Nashville when she received a telephone call from a man whom she thought to be her then boyfriend, Greg. The caller assumed the identity of Greg and talked to M.J. about a sexual fantasy. Following the caller's instructions, M.J. agreed to open her apartment window, blindfold herself, and lie on her bed completely nude. A man, thereafter, entered her apartment through the window and sexually penetrated her. When M.J. realized that the man was not Greg, she began to panic and scream. The culprit fled through the opened window.

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[11] M.J. did not report her experience to the police until three years after she was victimized.

Based upon the above evidence, the appellant was convicted on two counts of rape, one count of attempted rape, and a separate pleaded count of sexual battery. We affirm.

DISCUSSION

I.

The appellant first contends that the offenses of rape by fraud, as provided in Tenn. Code Ann. § 39-13-503(a)(3) (1991), were unconstitutionally vague as charged in this case because they did not define the proscribed fraudulent conduct.

This issue is without merit.

The appellant was indicted on three counts of rape accomplished by fraud and one count of attempted rape accomplished by fraud. At the time of the offenses in this case, the crime of rape was defined in Tenn. Code Ann. § 39-13-503(a) as the "unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: . . . (3) The sexual penetration is accomplished by fraud." The Tennessee Code defines "fraud" as "the term is used in normal parlance and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge, and shall be broadly construed to accomplish the purposes of this title." Tenn. Code Ann. § 39-11-106(a)(13) (1991).

The appellant insists that the rape statute is unconstitutionally vague as applied in this case because it failed to specify the proscribed conduct that constituted

fraud. He claims that the statute did not give reasonable notice of the prohibited fraudulent conduct because the alleged fraud in this case was peripheral to the sexual penetration.

Under the principles of due process, states are prohibited from holding an individual criminally liable for conduct which a person of common intelligence "could not reasonably understand to be proscribed" by a statute. *United States v. Harris*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954); *State v. Wilkins*, 655 S.W.2d 914, 915 (Tenn. 1983). This fair warning requirement, however:

> does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for '[i]n most English words and phrases there lurk uncertainties. . . . Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with certainty what statutes may compel or forbid.

Wilkins, 655 S.W.2d at 915-16 (quoting *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243, 244, 46 L.Ed.2d 185 (1975)).

To determine whether a statute comports with the notice requirement, we look to the statutory language and definitions provided by the General Assembly, and also to the judicial interpretation given to the statute. *Wilkins*, 655 S.W.2d at 916; *State v. Hayes*, 899 S.W.2d 175, 181 (Tenn. Crim. App. 1995). As stated above, our General Assembly has defined "fraud" for the purposes of Title 39 of the Tennessee Code, "as the term is used in normal parlance and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge, and

shall be broadly construed to accomplish the purposes of this title." Tenn. Code Ann. § 39-11-106(a)(13). Moreover, the Tennessee Supreme Court has set forth its interpretation of the term "fraud" by stating that, "[a] person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that representation." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).[12]

Relying upon those definitions, we have no doubt that the appellant was put on notice of the proscribed fraudulent conduct at issue in this case. The rape statute is clear on its face that a person commits a Class B felony when he or she engages in sexual penetration that is accomplished by fraud. The fraudulent conduct could have included trickery, subterfuge, or some other misrepresentation by the appellant that gave the victims a false impression and allowed or aided him in the accomplishment of the sexual penetration.

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[12] The State also refers to *Black's Law Dictionary* (5th ed. 1979), which defines "fraud" in part as:

> [a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

Contrary to the appellant's argument, the fraudulent conduct did not have to be the actual sexual penetration itself. To read Tennessee's rape statute that narrowly would substantially undermine its general meaning and purpose. There is no question that the statute is intended to punish those who engage in sexual penetration with a person without the person's consent. The common-law offense of rape, as adopted by our General Assembly, included the elements of carnal knowledge, force, and commission of the sexual penetration without the consent or against the will of the victim. *Wilkins*, 655 S.W.2d at 916 (citing C.J.S. § 8, p.471; 65 Am.Jur.2d, *Rape*, § 2, pp. 762-63).

In most rape cases, the "lack of consent" element is associated with the victim being forced or coerced into the sexual acts. In Tennessee, however, our General Assembly has provided that a victim's consent may also be ineffective or lacking due to fraudulent conduct committed by the prepetrator. *See* Tenn. Code Ann. § 39-11-106(a)(9); *State v. Tizard*, 897 S.W.2d 732, 742 (Tenn. Crim. App. 1994). The fraud may go directly to the sexual penetration itself, or may relate to the inducement of the sexual act. Tenn. Code Ann. § 39-11-106(a)(9)(A); *Tizard*, 897 S.W.2d at 741-42.

Having reviewed the statutes pertaining to rape, fraud, and effective consent, we uphold the rape statute as giving the appellant sufficient notice of the proscribed fraudulent conduct. As his case pertained to fraud in the inducement, which is defined both by case law and by statute, he cannot now be heard to complain that he was uninformed of the law.

II.

The appellant next contends that the multiple counts of rape in his indictment were invalid because they failed to state sufficient facts to support the elements of fraud. He argues that the indictment ran afoul of Tenn. Code Ann. § 40-13-202 (1991), and should have been dismissed.

This issue is without merit.

It is a well-known principle of law that a criminal indictment must include a sufficient description of the charged offense to insure that the accused understands the special nature of the charge he is called upon to answer. *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979). Tenn. Code Ann. § 40-13-202 provides guidance as to this requirement:

> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment, and in no case are such words as "force and arms" or "contrary to the form of the statute" necessary.

While the indictment must contain a sufficient description of the charged offense, "it is not necessary to amplify and encumber the charge by circumstantial detail and minute description." *State v. Griffis*, 964 S.W.2d 577, 591 (Tenn. Crim. App. 1997), *perm. app. denied* (Tenn. 1997). The basic requirements are: (1) to provide notice to the accused of the offense with which he is charged; (2) to notify the trial court of the charge so that it can enter an appropriate judgment and sentence; and (3) to describe

the offense so as to protect the accused against double jeopardy. *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991); *Griffis*, 964 S.W.2d at 590-91.

In appellant's case, the indictment included three counts of rape by fraud and one count of attempted rape by fraud. Each count was virtually identical in listing the criminal charge, the victim of the alleged offense, the date and county were [sic] the offense allegedly occurred, and the statutory provision involved. The counts of rape by fraud stated in pertinent part:

> [O]n the 19th day of Juy [sic], 1994, in Davidson County, Tennessee and before the finding of this indictment, [the appellant] did engage in unlawful sexual penetration of [the victim], and the sexual penetration was accomplished by fraud, in violation of Tennessee Code Annotated § 39-13-503, and against the peace and dignity of the State of Tennessee.

The count of attempted rape by fraud stated:

> [O]n the 24th day of August, 1992, in Davidson County, Tennessee and before the finding of this indictment, [the appellant] did attempt to engage in unlawful sexual penetration of [K.N.], and the sexual penetration was to be accomplished by fraud, in violation of Tennessee Code Annotated § 39-12-101, and against the peace and dignity of the State of Tennessee.

We conclude that the indictment satisfied Tenn. Code Ann. § 40-13-202, and the requirements espoused by our Supreme Court in *Byrd*. Each count tracked the language of the rape statute and provided sufficient detail to apprise the appellant of the charges and to give the trial

court a basis for entering a proper judgment. In addition, we are confident that appellant would be able to defend against double jeopardy if he were to be indicted on the same offenses in a subsequent case.

III.

The appellant next contends that the trial court erred in denying his supplemental motion for a bill of particulars. Before trial, the State responded to appellant's first motion for a bill of particulars, providing the exact times, dates, and locations of the alleged offenses, as well as the victims' names listed in the indictment. The trial court determined that the information provided by the State was sufficient and denied the appellant's motion for a supplemental bill of particulars. The appellant argues that the trial court abused its discretion under Rule 7(c) of the Tennessee Rules of Criminal Procedure and prevented him from preparing an adequate defense.

This issue is without merit.

Rule 7(c) of the Tennessee Rules of Criminal Procedure states that, "[u]pon motion of the defendant, the court may direct the filing of a bill of particulars so as to adequately identify the offense charged." The trial court has discretion in requiring the State to file a bill of particulars. However, the court must adhere to the general purpose of providing the defendant with enough information so that he or she may (1) prepare a defense, (2) avoid prejudicial surprise at trial, and (3) protect against double jeopardy. *Byrd*, 820 S.W.2d at 741; *State v. Hicks*, 666 S.W.2d 54, 56 (Tenn. 1984). Rule 7(c) is not meant to

be used for broad discovery[13] and is generally satisfied when the State provides the defendant with information concerning the time and place of the alleged offense and the names of the victims involved. *See Hicks*, 666 S.W.2d at 56; *State v. Anderson*, 748 S.W.2d 201, 204 (Tenn. Crim. App. 1985), *perm. app. denied* (Tenn. 1985).

In this case, there is no question that the appellant was sufficiently informed of the charged offenses and the exact times, dates, and locations where those offenses occurred. Also, from information provided in the indictment, the appellant had specific notice of the victims involved in each offense.[14] Based upon that information, the trial court concluded that the State had complied with Rule 7(c) of the Tennessee Rules of Criminal Procedure. We agree.

The basis of appellant's complaint is that he was not sufficiently apprised of the fraudulent conduct associated with the charges of rape and attempted rape. As the State points out, the appellant was essentially trying to ascertain the State's theory underlying the rape charges. Our Supreme Court has held that a bill of particulars is not intended to be a means of learning the State's evidence and theories, "although, to the extent the information sought is necessary, it will be required, even if to do so

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[13] Tenn. R. Crim. P. 7(c) (Advisory Commission Comments).

[14] If the requested information is in the indictment or has been provided otherwise by the State in some satisfactory form, no bill of particulars is required. *State v. Stephenson*, 878 S.W.2d 530, 539 (Tenn. 1994).

discloses the State's evidence or theories." *State v. Stephenson*, 878 S.W.2d 530, 539 (Tenn. 1994). Because the State provided the appellant with the time, dates, locations, and the victims' names pertaining to each offense, we conclude that the trial court did not abuse its discretion in denying the motion for a supplemental bill of particulars.

IV.

The appellant next contends that the indictment is fatally deficient because it failed to allege a specific culpable mental state for the offenses of rape and attempted rape.

This issue is without merit.

Shortly after the appeal was filed in this case, our Supreme Court rendered its decision in *State v. Hill*, 954 S.W.2d 725 (Tenn. 1997). In *Hill*, the Court held that an indictment is valid where its language satisfies the constitutional requirement of notice to the accused, its form meets the requirements set forth in Tenn. Code Ann. § 40-13-202,[15] and the requisite mental state can be logically inferred from the alleged criminal conduct. *Id.* at 726-27. We determined above that the appellant's indictment provided sufficient notice of the charged offenses

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[15] As stated earlier, Tenn. Code Ann. § 40-13-202 provides that an indictment must include the charged offense in ordinary and concise language that will provide the accused with a common understanding and will enable the trial court to enter a proper judgment.

and conformed to the statutory requirements under section 40-13-202. We must now address whether the requisite mental state for the rape offenses can be logically inferred from the charges in the indictment.

The three counts of rape state that the appellant engaged in "unlawful sexual penetration of [the victims], and the sexual penetration was accomplished by fraud, in violation of Tennessee Code Annotated § 39-13-503."[16] The count of attempted rape states that the appellant attempted to engage in "unlawful sexual penetration of K.N., and the sexual penetration was to be accomplished by fraud, in violation of Tennessee Code Annotated § 39-12-101."

The above counts are similar to the indictment in *Hill*, where the accused was charged with the unlawful sexual penetration of a victim less than thirteen (13) years of age, in violation of Tennessee Code Annotated § 39-13-502. *See Hill*, 954 S.W.2d at 727. The Court in *Hill* concluded that the required mental state could be logically inferred from the alleged criminal conduct in that case because the unlawful sexual penetration of a person under thirteen (13) is committable only if the defendant acts intentionally, knowingly, or recklessly. *Id.* at 729.

Following that decision, we conclude that the requisite mental state for the rape charges in appellant's case

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[16] The severed count of rape of victim M.J. was later amended to state that the unlawful sexual penetration was committed intentionally, knowingly, or recklessly. The appellant does not challenge that count of rape in this issue.

can be logically inferred from the language in the indictment. The indictment described the unlawful nature of the alleged sexual acts with specific references to the criminal statutes at issue. As similar language has been upheld in *Hill* and cases thereafter, we conclude that the appellant's indictment was valid. *Hill*, 954 S.W.2d at 729; *see also State v. Barney*, 986 S.W.2d 545, 547 (Tenn. 1999); *State v. Stokes*, 954 S.W.2d 729, 730 (Tenn. 1997).

V.

The appellant next contends that the trial court erred by allowing the admission into evidence of testimony and photographs depicting the contents of his vehicle at the time of his arrest. He argues that the evidence was not relevant and that any probative value was substantially outweighed by the danger of unfair prejudice. He further argues that the evidence depicted a bad act or crime that was inadmissible under Rule 404(b) of the Tennessee Rules of Evidence.

This issue is without merit.

The appellant was arrested at approximately 12:25 a.m. on May 24, 1995, at a public telephone within the Fairlane Square shopping center in Nashville. Photographs taken at the arrest scene show the appellant, his vehicle parked next to the public phone, and various angles of the interior and contents of the vehicle. The State placed particular emphasis on the photographs

revealing a stocking cap, condoms, quarters, and several phone books found inside the vehicle.[17]

We shall first address appellant's contention that the photographs were not relevant to the charges of rape and attempted rape. As the State argues in its brief, there is no question that the photographs depict the appellant engaged in some type of late-night activity involving telephone calls. The photographs reflect time, location, and circumstances that are remarkably similar to the descriptions provided by each victim. Moreover, the photograph of the stocking cap corroborates the statement given by victim K.N.

The appellant argues, however, that any probative value of the photographs was minimal because his identity as the "Fantasy Man" was not in dispute. He contends that the danger of unfair prejudice outweighed that low probative value and that the photographs were otherwise inadmissible under Rule 404(b) of the Tennessee Rules of Evidence. We disagree.

The trial court reviewed the evidentiary value of the photographs and allowed them into evidence over the appellant's objection.[18] We afford considerable deference

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[17] The State argued at trial that the stocking cap was similar to the cap described by victim K.N. as being worn by the man outside of her hotel window.

[18] At trial, the appellant objected to the admission of the photographs on the basis of relevancy and unfair prejudice. He did not raise an objection to the photographs under Rule 404(b) of the Tennessee Rules of Evidence until this appeal. The trial court, therefore, was never afforded an opportunity to rule on the merits under Rule 404(b).

to the trial court's determination and decline to interfere without a showing that the trial court abused its discretion. *State v. Braden*, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993), *perm. app. denied* (Tenn. 1993). Moreover, we conclude from our independent review that the photographs were sufficiently probative of the rape offenses and were properly submitted for the jury's consideration.

Rule 404(b) incorporates the traditional exclusionary rule prohibiting the admission into evidence of other crimes, wrongs, or acts that are offered to prove the character of a person in order to show action in conformity therewith. Photographs do not necessarily fall under the exclusionary rule. However, the appellant argues that the photographs in this case depict acts of a nature that implicate him as a possible sex offender and were inadmissible under Rule 404(b) to prove that he committed the rape offenses.

Assuming that the photographs represent "acts" as argued by the appellant, the photographs were nevertheless admissible under the limited exception to Rule 404(b). Rule 404(b) permits the introduction of other crimes, wrongs, or acts when the evidence is not being offered to prove character or conforming conduct. Examples include evidence to show motive, intent, knowledge, identity, absence of mistake, and a common scheme or plan for the commission of two or more crimes so related to each other that the proof of one tends to establish the other. *State v. Hallock*, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993) (citing *Collard v. State*, 526 S.W.2d 112, 114 (Tenn. 1975)).

Based upon the unusual facts in this case, we conclude that the photographs were probative of a unique, signature scheme used by the appellant to prepetrate [sic] the sexual acts against the victims. While the photographs alone do not show the appellant engaged in a deceptive telephone scheme, they reveal his presence late at night at a public telephone in close proximity to where the original "fantasy" calls were placed. Various items depicted in the photographs, including the telephone books, the quarters, and the condoms, are probative of an intent to make multiple telephone calls and a possible intent to engage in sexual intercourse. When viewed collectively, the photographs corroborate both the appellant's and the victims' stories describing late night telephone calls in which the whispering caller expressed his desire to act out a specific sexual fantasy.

The trial court assessed the relevancy of the photographs, with arguments of counsel conducted away from the jury, and concluded that the risk of unfair prejudice from the photographs did not outweigh their probative value.[19] We find no evidence to disturb that conclusion

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[19] Rule 404(b) establishes three conditions that the trial court must satisfy before allowing the admission of other crimes, wrongs, or acts into evidence. The court must, upon request, conduct a hearing outside of the jury's presence. The court must then determine "that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence." In addition, the court must determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice. As we mentioned above, the trial court did not specifically rule on the conditions under Rule 404(b) because the appellant did not raise that objection at trial.

and uphold the trial court's decision to admit the photographs into evidence.

VI.

The appellant next contends that the trial court erred in denying his motion to sever the multiple count indictment. He argues that the counts of rape pertaining to the victim C.S. should have been severed and tried separately from those pertaining to K.N.

This issue is without merit.

As previously mentioned, the indictment contained two counts of rape of victim C.S., one count of attempted rape of K.N., and one count of rape of M.J. Before trial, the prosecution voluntarily severed the count of rape pertaining to victim M.J. from the three counts involving C.S. and K.N. The appellant, thereafter, filed a motion to sever the rape counts between C.S. and K.N. The trial court conducted a pre-trial hearing on the motion and concluded that the three counts could be tried together.

Our review of this issue is governed by Rule 8 and Rule 14 of the Tennessee Rules of Criminal Procedure. We must first determine, as a matter of law, whether the joinder of the rape counts was proper under Tenn. R. Crim. P. 8(b). Rule 8(b) permits two or more offenses to be joined in the same indictment in separate counts if the offenses "constitute parts of a common scheme or plan or if they are of the same or similar character." However, under Tenn. R. Crim. P. 14(b)(1), a defendant is entitled to a severance of two or more offenses that have been joined for trial unless: the offenses are part of a common scheme

or plan,[20] and the evidence of one would be admissible in the trial of the other.[21]

There is no question that the rape offenses in this case are virtually identical in nature and design, sharing a common scheme or plan against the female victims. For approximately two years, the appellant engaged in a repetitious pattern of placing late-night telephone calls to young women in the Nashville area, during which, he would discuss the same sexual fantasy and would suggest that he was someone other than himself. These similarities, as evidenced by the statements of both C.S. and

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[20] There are three categories of "common scheme or plan" evidence: (1) distinctive designs or signature crimes; (2) a continuing plan or conspiracy; and (3) the same transaction. *State v. Hoyt*, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995) (citing N. Cohen, *Tennessee Law of Evidence*, § 404.11 (2nd ed. 1990)). The rape offenses in appellant's case fall into the first category.

[21] This Court has previously held that trial courts are required to conduct pre-trial hearings when addressing severance issues under Tenn. R. Crim. P. 14(b)(1). *Hoyt*, 928 S.W.2d at 944. Although a hearing was held in this case on the appellant's motion to sever, we find that it complied minimally at best with the requirements set forth in Rule 14(b)(1). The trial court heard arguments from counsel on the common scheme or plan between the rape offenses and the relevancy of the evidence pertaining to those offenses, i.e., to demonstrate the appellant's identity, knowledge, and fraudulent intent. However, the trial court's findings and conclusions in that regard were not stated in the record. Instead of remanding the case for a new hearing, we shall complete the Rule 14(b)(1) analysis based upon the evidence of the rape offenses in the record.

K.N., are sufficient to establish a distinctive *modus operandi*, thus satisfying the "common scheme or plan" requirement under Tenn. R. Crim. P. 14(b)(1).

We must next address whether the evidence of the attempted rape offense against K.N. would have been admissible in a trial involving the two rape offenses against C.S. To answer this question, we look to the procedural requirements in Rule 404(b) of the Tennessee Rules of Evidence. Generally, evidence of another crime or bad act is inadmissible in the trial of a separate other crime because the evidence invites the trier of fact to infer guilt from propensity and character. Tenn. R. Evid. 404(b). However, when the evidence of another crime or bad act is relevant for reasons other than the character of the accused, it is admissible so long as its probative value is not substantially outweighed by the danger of unfair prejudice. As we previously stated, those other grounds of relevancy include: (1) motive; (2) intent; (3) guilty knowledge; (4) identity of the defendant; (5) absence of mistake or accident; or (6) a common scheme or plan for the commission of two or more crimes so related to each other that proof of one tends to establish the other. *Collard*, 526 S.W.2d at 114.

Having carefully reviewed the evidence in this case, we agree with the State that the evidence of each rape offense was relevant to show the appellant's identity, intent, and the common scheme or plan that linked the offenses together. The basis of the appellant's defense at trial was that, although he intended to have sexual intercourse with both K.N. and C.S., he never intended nor did he actually trick the young women into believing that

he was someone other than himself. Under those circumstances, we conclude that the evidence of each rape offense was highly probative of the appellant's unique *modus operandi* and his intent to deceive the victims.

Moreover, we cannot say that the probative value was substantially outweighed by the danger of unfair prejudice. The evidence of each rape offense was prejudicial on the ultimate question of guilt; however, the resulting prejudice was no greater than the prejudice which naturally flows from reliable evidence used by the prosecution to persuade the trier of fact. We, therefore, conclude that the evidence of each rape offense would have been admissible in the trial of the other offenses. The joinder of those offenses was not error.

VII.

The appellant next contends that the prosecution issued a peremptory challenge to a prospective juror in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). He argues that the prosecution's challenge impermissibly targeted a prospective juror's physical disability or handicap.

This issue is without merit.

During the voir dire stage of trial, the prosecution used a peremptory challenge to remove a prospective juror, Ms. P., from the jury venire. The appellant objected to the challenge and requested the prosecution to offer a

race-neutral reason for the removal. The trial court overruled the appellant's objection noting that on the challenge slip, the prosecution had apparently offered a race-neutral justification for the challenge.

There is some question as to the precise reason given by the prosecution for the peremptory challenge of Ms. P. The challenge slips were not included in the record on appeal and the discussions of counsel during voir dire do not reveal the basis for the prosecution's challenge. The only evidence to support appellant's contention is the transcript of the jury selection process which indicates that Ms. P. has arthritis, walks with a cane, and has trouble walking or standing for long periods of time.

We agree with the State that the above evidence alone is insufficient to prove that the prosecution challenged Ms. P. solely based upon her apparent disability. From evidence in the record, it is entirely possible that the peremptory challenge was based upon the prosecution's belief that Ms. P. would somehow be unfavorable or unsympathetic to its case. Peremptory challenges under those circumstances are permitted as part of allowing the litigants to select a "fair" jury. *State v. Turner*, 879 S.W.2d 819, 821 (Tenn. 1994).

It is generally understood that a peremptory challenge may be exercised for any reason unless that reason is specifically prohibited by legislation or by judicial decision. *Id.* While the law does not condone the use of peremptory challenges to target prospective jurors with physical disabilities, the appellant has failed to prove that the prosecution discriminated on that basis. His contention, therefore, is without merit.

VIII.

The appellant next contends that the trial court improperly instructed the jury on the statutory definitions of "deception" and "coercion." He argues that the trial court improperly omitted a portion of the definition of deception and that the court should not have instructed the jury on the definition of coercion.

This issue is without merit.

Upon request by the prosecution, the trial court instructed the jury on a portion of the definition of deception under Tenn. Code Ann. § 39-11-106(a)(6)(A). The instruction read:

> Deception occurs when a person knowingly:
>
> (1) creates or reinforces a false impression by words or conduct, including false impressions of fact, law, value, or intention, or other state of mind that the person does not believe to be true;
>
> (2) prevents another from acquiring information which would likely affect the other's judgment in the transaction;
>
> (3) fails to correct a false impression of law or fact that the person knows to be false, and
>
> (a) the person created, or
> (b) knows is likely to influence another.
>
> Deception does not include puffing by statements unlikely to deceive ordinary persons in the group addressed.

The appellant argues that the trial court erred in omitting a part of the definition which states: " 'Deception' does not include falsity as to matters having no

pecuniary significance . . . " Tenn. Code Ann. § 39-11-106(a)(6)(B). According to the appellant, the trial court's omission allowed the jury to consider the element of deception more broadly than provided in the statute. In addition, he contends that the evidence did not support the jury charge on deception.

From the record, it appears that the trial court instructed the jury on deception based upon the language contained in the statute and the jury charge on effective consent. Tenn. Code Ann. § 39-11-106(a)(9). The jury instruction stated that, " '[e]ffective consent' means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when induced by deception or coercion."

The appellant correctly states that the trial judge had an affirmative duty to give a complete jury charge of the law as fairly raised by the evidence. *See State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986). We find no problem with the trial court's decision to instruct the jury on deception, as the evidence tended to show that the appellant used spoken words to create and reinforce a false impression. The instruction, however, should have included the entire definition of deception as provided in the statute.

The State concedes that the omission by the trial court was error, but argues that the error was harmless because the entire instruction on deception was surplusage. We agree that the error was harmless in this case. The trial court fully instructed the jury on the offenses of rape by fraud and attempted rape by fraud,

and the statutory definitions of fraud and effective consent. The jury was informed of the law and the definitions pertinent to the appellant's case and we fail to see how the verdict would have been any different had the trial court included or omitted the entire definition of deception. Therefore, we are confident that the jury charge on deception was harmless beyond a reasonable doubt.

The appellant also contends that the instruction on coercion was error because coercion is not an element of the charged offenses and was not supported by the evidence. After instructing the jury on the offenses of rape and attempted rape by fraud, the trial court included an instruction on the definition of coercion as follows: "Coercion means threat of kidnapping, extortion, force or violence to be performed immediately or in the future, or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age."

The basis of appellant's argument is that the instruction on coercion may have influenced the jury to consider the rape offenses as crimes of physical force rather than crimes involving fraud. The appellant emphasizes this point in connection with the testimony of C.S. in which she stated that she froze with fear when the appellant touched her leg.

This argument, however, overlooks specific instances in the record where both the prosecution and the trial court informed the jury that the rape charges against the appellant involved the use of fraud, not force. Both the indictment and the jury instruction on the charged offenses clearly describe the offenses as rape by fraud

and attempted rape by fraud. Moreover, in the closing argument, the prosecution informed the jury about the different types of rape proscribed by Tenn. Code Ann. § 39-13-503. The assistant prosecutor explained in pertinent part: "The first is that force or coercion was used to accomplish the act. [The appellant] is not being charged with using force or coercion. He is being charge [sic] with using fraud."

Having carefully reviewed the instruction, we are confident that the jury was properly informed on the specific offenses to be considered in the deliberation. The mere inclusion of the definition of coercion did not amount to an improper charge on the offense of rape by force. Instead, it appears that the trial court included the definition of coercion based upon the use of that term in the definition of effective consent. *See* Tenn. Code Ann. § 39-11-106(a)(9)(A). We find no error in the instruction.

IX.

The appellant lastly contends that the evidence was legally insufficient to sustain his convictions of rape and attempted rape.

This issue is without merit.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the State to determine whether a rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *State v. Duncan*, 698 S.W.2d 63, 67

(Tenn. 1985). We do not reweigh the evidence and are required to afford the State with the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence, are resolved by the trier of fact, not this Court. *Cabbage*, 571 S.W.2d at 835. We will not disturb a verdict of guilt for a lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the appellant guilty beyond a reasonable doubt. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The appellant first argues that he was entitled to a judgment of acquittal on the charge of attempted rape, involving K.N., because the evidence failed to show that he took a substantial step toward the commission of rape by fraud. The term "substantial step" is described in the criminal attempt statute as follows: "Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense." Tenn. Code Ann. § 39-12-101(b).

Our Supreme Court's decision in *State v. Reeves*, 916 S.W.2d 909, 912 (Tenn. 1996), provides guidance as to when a person's conduct constitutes a substantial step towards the commission of an offense. The Court recognized significant problems with the traditional rule from

Dupuy v. State, 204 Tenn. 624, 325 S.W.2d 238 (1959), which required courts to distinguish between "mere preparation" to commit the offense and the "act itself." *Reeves*, 916 S.W.2d at 913. Under the *Dupuy* approach, conduct did not constitute a substantial step towards the commission of a crime unless there was some overt act that went beyond the preparation to commit the offense at issue. 325 S.W.2d at 240.

The Court in *Reeves* abandoned the *Dupuy* rule based upon a finding that the rule was difficult to apply and because the rule did not fulfill the legislature's objective of preventing inchoate crimes from becoming full-blown crimes. *Reeves*, 916 S.W.2d at 914. While not creating or defining a new rule under the "substantial step" analysis, the *Reeves* Court focused on the language of Tenn. Code Ann. § 39-12-101(b) to conclude that the defendant's conduct in that case was a substantial step towards the commission of second degree murder where the defendant possessed materials to be used in the commission of the crime at or near the crime scene, and the possession of those materials served no lawful purpose. *Id.*

Relying both on the attempt statute and the analysis in *Reeves*, we conclude that the evidence in this case was sufficient for a rational trier of fact to find that the appellant's conduct towards K.N. constituted a substantial step in the commission of rape by fraud. There was evidence that the appellant talked to K.N. several times by telephone, during which he convinced her that he was her fiancé and that the two should meet and have sexual intercourse at a nearby hotel. The appellant described his sexual fantasy to K.N. and expressed a specific intent to fulfill that fantasy with her. K.N. complied with the

appellant's wishes, in part, by checking into the hotel and by removing her clothes while she waited on his arrival. During that time, the appellant made two attempts to act out his fantasy, each time walking by the hotel room, where the door was to be unlocked. The evidence reflects that his sexual fantasy was interrupted only by K.N. noticing through the window that the appellant was not her fiancé. The appellant's conduct in that respect is sufficiently corroborative of an intent to commit the rape offense against K.N. Therefore, the jury properly found that his conduct was a substantial step in the commission of rape.

The appellant also challenges the evidence as it pertains to the element of fraud in the convictions of rape and attempted rape. He argues that K.N. and C.S. consented to sexual intercourse and that he never told them he was anyone other than himself. In this contention, the appellant disputes the testimony of both K.N. and C.S. and essentially requests this Court to reweigh the evidence. He further argues that even if we accept the victims' testimony, the evidence is nevertheless insufficient as a matter of law because there was no showing that the sexual penetration or the attempted sexual penetration was accomplished by fraud.

Initially, we emphasize that the victims' testimony was fully accredited by the jury's verdict of guilt. We will not reweigh that evidence because to do so would invade the province of the trier of fact. *Cabbage*, 571 S.W.2d at 835. Moreover, having reviewed the record in this case, we conclude that there was sufficient proof for the jury to find that the offenses committed against K.N. and C.S. were accomplished by fraud.

Both K.N. and C.S. testified at trial that they agreed to participate in the sexual fantasy, knowing that the fantasy involved intercourse and other carnal activities. The appellant relies upon that testimony as it shows that the victims consented to the sexual acts. However, the appellant overlooks critical evidence considered by the jury which reflects that any consent given by the victims was conditioned solely upon their mistaken belief that the appellant was someone else. Based upon the testimony of K.N., C.S., and C.S.'s roommate, Shannon Cooley,[22] the appellant concealed his true identity and pretended to be some other person in order to obtain their acquiescence in the fantasy.

The jury evaluated the testimony together with other evidence in the record and determined that the appellant was guilty of rape by fraud and attempted rape by fraud. We find no basis to disturb the jury's verdict and accordingly affirm the convictions.

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[22] Ms. Cooley testified that she received a telephone call from a person who spoke to her in a whispering voice about his desire to have sexual intercourse with her at her apartment. The telephone call took place while Ms. Cooley and C.S. were still living together, approximately three months after C.S. reported her rape to the police The caller never identified himself to Ms. Cooley, but instead asked her if she knew who he was. She testified that she initially thought the caller was her boyfriend, Pat. However, remembering C.S.'s experience, she suspected that the caller was the same person who had previously called C.S. Ms. Cooley kept the mystery caller on the telephone for approximately twenty minutes and convinced him to call her back that same evening. During their conversations, the caller told Ms. Cooley that he loved her and that he wanted to have sex with her.

CONCLUSION

Having found no reversible error in this case, we uphold the appellant's convictions on all counts. The judgments of the trial court are affirmed with costs taxed to the State of Tennessee.

/s/ William M. Barker
WILLIAM M. BARKER,
Special Judge

CONCUR:

/s/ Gary R. Wade
GARY R. WADE, Presiding Judge

/s/ Curwood Witt
CURWOOD WITT, JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT NASHVILLE

STATE OF TENNESSEE Appellee, v. RAYMOND MITCHELL, III Appellant.	) C.C.A. NO. 01C01-9612-CR-00502) (consolidated with)) C.C.A. NO. 01C01-9702-CR-00057) DAVIDSON COUNTY) Hon. Ann. Lacy Johns, Judge (Presiding at trial)) Hon. Seth Norman, Judge (Presiding at guilty plea hearing)) (Rape; Attempted Rape)

ORDER

The appellant, Raymond Mitchell, III, has filed a petition for rehearing following our decision in this case on July 30, 1999. The appellant contends that our Court's opinion incorrectly stated the facts and misapplied the relevant law. We have considered the appellant's petition and it is without merit. We are confident that our Court's decision accurately comprehended the facts and correctly applied the law.

It is, therefore, ordered that the petition for rehearing be, and hereby is, denied.

PER CURIAM

Wade, P.J.
Witt, J.
Barker, Sp. J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE Plaintiff/Appellee, v. RAYMOND LEE MITCHELL, III, Defendant/Appellant.	)	DAVIDSON COUNTY NO. M1996-00008-SC-R3-CD

ORDER

(Filed Jan. 31, 2000)

Upon consideration of the application for permission to appeal and the record before us, the application is denied.

PER CURIAM

Not participating – Barker and Birch, J.

State of Tennessee, Davidson County

COUNT 1

APRIL TERM, 1995, CRIMINAL COURT

THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that:

RAYMOND MITCHELL, III

on the ___ day of **February, 1992,** in Davidson County, Tennessee and before the finding of this indictment, did engage in unlawful sexual penetration of **Marilyn Janke,** and the sexual penetration was accomplished by fraud, in violation of Tennessee Code Annotated § 39-13-503, and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT 2

APRIL TERM, 1995, CRIMINAL COURT

THE GRAND JURORS of Davidson County, Tennessee, duty impaneled and sworn, upon their oath, present that:

RAYMOND MITCHELL III

on the **24th day of August, 1992,** in Davidson County, Tennessee and before the finding of this indictment did attempt to **engage in unlawful sexual penetration of Kelley Naff, and the sexual penetration was to be**

accomplished by fraud, in violation of Tennessee Code Annotated § 39-12-101, and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT 3

APRIL TERM, 1995, CRIMINAL COURT

THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that:

RAYMOND MITCHELL, III

on the **19th day of July, 1994,** in Davidson County, Tennessee and before the finding of this indictment, did engage in unlawful sexual penetration of Christine Elizabeth Shone, and the sexual penetration was accomplished by fraud, in violation of Tennessee Code Annotated § 39-13-503, and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT 4

APRIL TERM, 1995, CRIMINAL COURT

THE GRAND JURORS of Davidson County, Tennessee duly impaneled and sworn, upon their oath, present that:

RAYMOND MITCHELL III

on the **19th day of July, 1994,** in Davidson County, Tennessee and before the finding of this indictment, did engage in unlawful sexual penetration of **Christine Elizabeth Shone**, and the sexual penetration was accomplished by fraud, in violation of Tennessee Code Annotated § 39-13-503, and against the peace and dignity of the State of Tennessee.

/s/ Victor S. Johnson III
Victor S. Johnson, III
District Attorney General
Twentieth Judicial District